

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TIMOTHY ALGAIER, DEBRA
EDDY,

Plaintiffs,

v.

BANK OF AMERICA, N.A., a
national bank doing business in
Washington State, et. al.,

Defendants.

NO: 13-CV-0380-TOR

ORDER RE: DEFENDANT'S
MOTION FOR A PROTECTIVE
ORDER

BEFORE THE COURT are Defendant Bank of America, N.A.'s Motion for Protective Order (ECF No. 39) and Plaintiffs' Requests for Sanctions and for Extension of Time to Conduct and Complete Discovery (ECF No. 41). This matter was submitted for consideration without oral argument. Although a hearing date of June 22, 2015, is set for this matter, this Court finds no reason to delay its order. The Court has reviewed the briefing and the record and files herein, and is fully informed.

BACKGROUND

This case concerns a threatened nonjudicial foreclosure. Plaintiffs initiated this action in Spokane County Superior Court on October 9, 2013, which action Defendants timely removed to this Court. ECF No. 1. Plaintiffs' three remaining causes of action—after several of their claims have suffered dismissal by this Court—are for fraud, promissory estoppel, and breach of contract. *See* ECF Nos. 20, 26.

In the instant motion, Defendant Bank of America moves for a protective order pursuant to Fed. R. Civ. P. 26(c) to prevent public dissemination of its sensitive and confidential business documents. ECF No. 39. On March 24, 2015, Defendant produced over 800 pages of documents in response to Plaintiffs' discovery requests. ECF No. 40 at 3. At this time, Defendant informed Plaintiff that upon entry of a protective order governing the disclosure and use of confidential information, it would provide additional documents pursuant to Plaintiffs' requests. *Id.* Defendant provided Plaintiffs with a draft stipulated protective order on April 1, 2015, *id.*; however, on April 16, 2015, Plaintiffs informed Defendant that they opposed such an order, *id.* at 3-4.

In their belated response briefing, Plaintiffs continue to oppose entry of a protective order, asserting that Defendant has not shown good cause. ECF No. 41 at 4-6. Additionally, Plaintiffs request that the Court grant an extension of time to

1 conduct and complete discovery due to Defendant's "delay tactics," and impose
2 sanctions on Defendant for its "bad faith filings." *Id.* at 8.

3 DISCUSSION

4 A. Protective Order

5 Defendant Bank of America requests that this Court enter a protective order
6 excluding certain discoverable documents from public dissemination and use
7 outside of this litigation. ECF No. 39 at 9; *see* ECF No. 39-1 (proposed protective
8 order). In support of this request, Defendant contends these documents are
9 internal business and loan servicing records which contain proprietary content,
10 sensitive and confidential information, and trade secrets. ECF No. 39 at 9.

11 According to Defendant, its loan servicing system is wholly unknown to outsiders;
12 it actively takes steps to guard the secrecy of the particulars of its loan servicing
13 system; this information would be highly valuable to other loan servicers; and
14 Defendant implements security measures and routine audits to ensure its
15 confidential and proprietary information is not publicly disseminated. *Id.* at 10.
16 As such, public dissemination of these records would put Defendant at a
17 competitive disadvantage. *Id.* at 9.

18 "As a general rule, the public is permitted 'access to litigation documents
19 and information produced during discovery.'" *In re Roman Catholic Archbishop*
20 *of Portland in Or.*, 661 F.3d 417, 424 (9th Cir. 2011) (quoting *Phillips v. Gen.*

1 *Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002)). However, under Federal Rule
2 of Civil Procedure 26(c)(1), “[t]he court may, for good cause, issue an order to
3 protect a party from annoyance, embarrassment, oppression, or undue burden or
4 expense, including . . . requiring that a trade secret or other confidential research,
5 development, or commercial information not be revealed or be revealed only in a
6 specified way” Fed. R. Civ. P. 26(c)(1)(G). The party seeking a protective
7 order bears the burden of showing “good cause”—that is, that specific prejudice or
8 harm will result if no protective order is granted. *In re Roman Catholic*
9 *Archbishop*, 661 F.3d at 424 (citing *Foltz v. State Farm Mut. Auto Ins. Co.*, 331
10 F.3d 1122, 1130 (9th Cir. 2003)). Additionally, the moving party must also
11 demonstrate that it has “in good faith conferred or attempted to confer with other
12 affected parties in an effort to resolve the dispute without court action.” Fed. R.
13 Civ. P. 26(c)(1).

14 Here, finding that Defendant has in good attempted to confer with Plaintiffs
15 and demonstrated good cause for issuance of a protective order, this Court finds
16 entry of a protective order is warranted. Without entry of a protective order
17 protecting Defendant’s sensitive and confidential documents from public
18 dissemination, Defendant has sufficiently demonstrated that it would be placed at a
19 competitive disadvantage with other loan servicers. Importantly, Plaintiffs, despite
20 their unyielding opposition, will suffer no prejudice with entry of this order.

1 Plaintiffs' opposition seems to lie in their confusion about the effect of the
2 proposed order. Contrary to Plaintiffs' possible misunderstanding, entry of the
3 proposed protective order will not prevent their access to the confidential
4 documents for use in these proceedings; rather, by the terms of the proposed order,
5 "[a] receiving party may use confidential material that is disclosed or produced by
6 another party or by a non-party in connection with this case only for prosecuting,
7 defending, or attempting to settle this litigation." ECF No. 39-1 at 3. As a
8 "receiving party," Plaintiffs will have access to these designated confidential
9 materials for use in these proceedings but may only use the documents in a manner
10 prescribed by the order. Accordingly, this Court **GRANTS** Defendant's Motion
11 for Protective Order (ECF No. 39).

12 **B. Extension of Discovery**

13 In their response briefing, Plaintiffs request an extension of time to conduct
14 and complete discovery due to Defendant Bank of America's "delaying tactics."
15 ECF No. 41 at 7. According to Plaintiffs, they have received no responses to their
16 discovery requests other than objections. *Id.* Plaintiffs request this Court extend
17 the current July 27, 2015 deadline to January 15, 2016. *Id.*

18 Under Federal Rule of Civil Procedure 16(b), a court's scheduling order may
19 be modified only for good cause and with the judge's consent. Fed. R. Civ. P.
20 16(b)(4). When determining whether plaintiffs have demonstrated good cause, the

1 court “primarily considers the diligence of the party seeking the amendment.” *In re*
2 *W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 737 (9th Cir.
3 2013) (quoting *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.
4 1992)). “The district court may modify the pretrial schedule ‘if it cannot
5 reasonably be met despite the diligence of the party seeking the extension.’”
6 *Johnson*, 975 F.2d at 609 (quoting Fed. R. Civ. P. 16 advisory committee’s notes).
7 However, “[i]f that party was not diligent, the inquiry should end.” *Id.* The district
8 court, in supervising the pretrial phase of litigation and deciding the preclusive
9 effect of a pretrial order, has “broad discretion.” *C.F. ex rel. Farnan v. Capistrano*
10 *Unified School Dist.*, 654 F.3d 975, 984 (9th Cir. 2011).

11 As a threshold issue, Plaintiffs’ request does not comply with proper
12 procedures for motion practice before this Court. Pursuant to Federal Rule of Civil
13 Procedure 7(b), a request for a court order must be made by written motion stating
14 with particularity the grounds for seeking the order and the relief sought. Fed. R.
15 Civ. P. 7(b)(1). Relatedly, Local Rule 7.1 explains the proper procedure for
16 motion practice. LR 7.1(a). Plaintiffs’ request, filed in their response briefing,
17 does not comport with these procedures.

18 Even if this Court were to consider Plaintiffs’ request, they have failed to
19 demonstrate good cause for amending this Court’s scheduling order and extending
20 the discovery deadline. Although Plaintiffs assert that they have received no

1 responses to their discovery requests, ECF No. 41 at 7, Defendant's filings seem to
2 suggest otherwise. On October 29, 2014, Defendants Bank of America and
3 Mortgage Electronic Registrations Systems served their initial disclosures on
4 Plaintiffs. ECF No. 40-1. On November 13, 2014, Defendants served
5 supplemental initial disclosures on Plaintiffs. ECF No. 40-2. On March 24, 2015,
6 Defendants responded to Plaintiffs first set of discovery requests. ECF No. 40-3.
7 At this time, Defendants explained that they would disclose the remaining
8 responsive documents upon entry of a protective order, which proposed protective
9 order was sent to Plaintiffs on April 1, 2015. ECF No. 40-4. Moreover,
10 considering Plaintiffs did not issue their first set of discovery requests until
11 February 2, 2015, and just now requested an extension—nearly one month before
12 the July, 27, 2015 discovery deadline—they have also failed to demonstrate
13 diligence. Accordingly, Plaintiffs request is **DENIED**.

14 **C. Sanctions**

15 Plaintiffs also request, in their response briefing, that this Court impose
16 sanctions against Defendant Bank of America in the amount of \$9,500 for “bad
17 faith delaying tactics based on bad faith filings.” ECF No. 41 at 8. Although
18 Plaintiffs do not explain what actions of Defendant warrant sanctions,¹ their

19 ¹ It is unclear from Plaintiffs' briefing pursuant to what authority they are moving
20 for sanctions. The title of their response briefing cites to Rule 37(f) (failing to

1 motion seems to take issue with Defendant's withholding of certain discovery
2 documents in the absence of a protective order.

3 Under the Federal Rules of Civil Procedure, a party has a duty to cooperate
4 and comply with the discovery process. If a party fails to provide relevant
5 discovery as required by the Federal Rules of Civil Procedure, the party may be
6 prevented from using that information "to supply evidence on a motion, at a
7 hearing, or at a trial, unless the failure was substantially justified or is harmless."
8 Fed. R. Civ. P. 37(c)(1). "In addition to or instead of this sanction, the court, on
9 motion and after given an opportunity to be heard: (A) may order payment of the
10 reasonable expenses, including attorney's fees, caused by the failure; (B) may
11 inform the jury of the party's failure; and (C) may impose other appropriate
12 sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi)." *Id.* The
13 Ninth Circuit "gives particularly wide latitude" to the district's court decision to
14 impose sanctions under Rule 37(c)(1). *R & R Sails, Inc. v Ins. Co. of Penn.*, 673
15 F.3d 1240, 1245 (9th Cir. 2012). "The party facing sanctions bears the burden of

16
17 participate in framing a discovery plan), and the body of their brief cites to Rule 11
18 (representations to the court). *See* ECF No. 41. This Court construes their request
19 under Rule 37(c), which provides for sanctions when a party fails to provide
20 information or identify a witness as required by Rule 26(a) and (e).

1 proving that its failure to disclose the required information was substantially
2 justified or is harmless.” *Id.* at 1246.

3 Again, Plaintiffs’ request does not conform to the appropriate procedures for
4 motion practice. *See* Fed. R. Civ. P. 7(b)(1); L.R. 7.1(a). Nevertheless, despite
5 Plaintiffs’ allegations, Defendants have appeared to have disclosed the required
6 discovery information, save for the documents covered by the proposed protective
7 order. Accordingly, because this Court finds no cause to sanction Defendants,
8 Plaintiffs request is **DENIED**.

9 **IT IS ORDERED:**

10 1. Defendant Bank of America, N.A.’s Motion for Protective Order (ECF
11 No. 39) is **GRANTED**. The Protective Order, filed at ECF No. 39-1, is approved
12 and shall be entered. The parties shall abide by the Protective Order.


13 2. Plaintiffs’ Request for Extension of Time to Conduct and Complete
14 Discovery (ECF No. 41) is **DENIED**.

15 3. Plaintiff’s Plaintiffs’ Request for Sanctions (ECF No. 41) is **DENIED**.

16 The District Court Executive is directed to enter this Order and provide
17 copies to the parties.

18 **DATED** June 18, 2015.




THOMAS O. RICE
United States District Judge